Office - Supreme Court, U.S.
FILED
JAN 27 1950
JOHN T. FEY, Clerk

No. 750

In the

Supreme Court of the United States

DR. DONALD WATT, D. O.,
Petitioner,

v.

TEXAS STATE BOARD OF MEDICAL EXAMINERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

MARTIN & BAILEY,
1207 Texas Bank Bldg.,
Dallas, Texas,
Attorneys for Petitioner.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-8711

INDEX TO PETITION

	Page
Jurisdictional Statement	2
Statement of Case	2-4
Specification of Error	4-5
Reason Relied Upon by Petitioner for Allowance of Writ	5-13
Conclusion	13-14
Appendix A	15-25
Appendix B	27-28

Page

Browder v. Gayle, 142 F. Supp. 707, 1 L. Ed. 113-245 13

Columbia etc. Electric Co. v. S. Carolina, 261 U. S. 236, 67 L. Ed. 629 12

Douglas v. Pike County, 101 U. S. 687, 25 L. Ed. 968 10

Edwards v. West Texas Hospital, 89 S. W. 2d 801 7, 11

Edwards v. Williamson, 70 A L. A. 145 12

Ex Parte Moffett, 64 Pa. 2d 1190 13

Farmers Life Insurance Co. v. Walters, 10 S. W. 2d 698 11

Ingraham v. Henson, 297 U. S. 378, 80 L. Ed. 728 10

Laisne v. California Board of Optometry, 123 Pa. 2d 457 12

Levin v. Baltimore & Ohio R. R. Co., 17 At. 2d 101 10

Lochner v. New York, 198 U. S. 53, 49 L. Ed. 937 13

McCullough v. Virginia, 172 U. S. 109, 43 L. Ed. 382 10

Muhlker v. New York Ry. Co., 197 U. S. 570, 49 L. Ed. 872 11

Murray v. Charleston, 96 U. S. 444, 24 L. Ed. 760 12

Norfolk & W. Ry. Co. v. Boyle, 12 Fed. Supp. 522 11

Republic Reciprocal Ins. Ass'n v. Colgin etc., 65 S. W. 2d 286 7, 11

Rockett v. Texas State Board of Medical Examiners, 287 S. W. 2d 190 6

Rowekaham v. Mercantile Commerce Bank & Trust Co., 72 F. 2d 852 10

Page

Saucier v. Life & Casualty Co., etc., 198 So. 625 13

Smith v. Elliott, 39 Tex. 201 11

Springfield Fire & Marine Ins. Co. v. Holmes, 32 F. Supp. 964 13

U. S. Const., Arts. 1 and 14 6

U. S. v. United Shoe Machinery Co., 234 F. 127 12

U. S. v. Seven Oaks Dairy Co., 10 F. Supp. 995 13

Woodson v. Scott & White Hospital, 186 S. W. 2d 720 7, 8, 11

Walker v. Whitehead, 16 Wall. 314, 21 L. Ed. 357 11

No.

In the

Supreme Court of the United States

DR. DONALD WATT, D. O.,

Petitioner,

v.

TEXAS STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

To the Honorable, the Supreme Court of the United States:

Now comes Dr. Donald Watt, D. O., hereinafter called Petitioner, and applies for a writ of certiorari, to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, to review a judgment rendered by said court on the 31st day of May, 1957, affirming a judgment against petitioner entered in the 134th Judicial District Court of Dallas County, Texas on the 10th day of July 1956.

The opinion of the Court of Civil Appeals affirming the trial court's judgment revoking Petitioner's license to practice medicine is reported in *303 S. W. 2d 884*, opinion by Justice Young, the opinion set out herein under APPENDIX A.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under Article 3, Sec. 2 and Article 1, Sec. 10 of the United States Constitution. It being contended by Petitioner that a state law, to-wit Sec. 12 of Art. 4505 of the Revised Civil Statutes of Texas, violates two sections of the Constitution.

STATEMENT OF THE CASE

Appellant is a licensed physician under the laws of the State of Texas. On November 7, 1955, Respondent entered an Order cancelling and revoking petitioner's license to practice medicine in the state of Texas. From the Order, Petitioner appealed to the District Court of Dallas County, Texas and on the 30th day of April, 1956. the case was tried to a jury in the 134th Judicial District Court of Dallas County, Texas, the Court submitting four Special Issues for the jury's consideration. The jury verdict was favorable to Petitioner, however the trial court denied Petitioner's motion for judgment and did on the 10th day of July, 1956, grant Respondent's Motion for judgment non obstante veredicto and entered a judgment suspending petitioner's license to practice medicine in the State of Texas for a period of 18 months. Petitioner excepted to the

action of the Court and perfected his appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

The Court of Civil Appeals affirmed the trial court's judgment, a motion for rehearing was filed within the time prescribed by law, and on the 28th day of June, 1957, overruled with no written opinion. Thereafter, within the time prescribed by law an application for writ of error was made in the Supreme Court of Texas and on October 23, 1957, the application was refused. Thereafter, on November 5, 1957, a Motion for Rehearing was filed in the Supreme Court which said Motion was, on November 13, 1957, denied.

Petitioner has exhausted all of his State remedies provided by law.

Petitioner, a licensed Doctor, was employed on a salary of $2,000.00 per month, by the Hoxsey Cancer Clinic, a Medical Institution specializing in the treatment of cancer, and was owned by Harry and Martha Hoxsey, who were not Doctors and who did not practice medicine. On November 7, 1955, while this relationship of employer and employe existed, Respondent, the Texas State Board of Medical Examiners entered an Order canceling and revoking Petitioner's license to practice medicine in the State of Texas basing its action on the authority conferred by Art. 4505 and Art. 4506 of the Revised Civil Statutes of Texas and specifically Sec. 18 of Art. 4505. It being contended by Respondent that since the Hoxsey Cancer Clinic was owned

by laymen and that Petitioner was working on a salary, he therefore was permitting and allowing his license to be used by said laymen to practice medicine contrary to the inhibitions of Sec. 12 of Art 4505. Said section as follows:

> "(12) The impersonation of a licensed practitioner, or permitting, or allowing, another to use his license, or certificate to practice medicine in this State, for the purpose of treating, or offering to treat, sick, injured or afflicted human beings."

Articles 4505 and 4506 of the Revised Civil Statutes of Texas are set out in full in APPENDIX B.

The facts detailed in the Opinion of the Court of Civil Appeals are correct and for the purpose of determining the point raised in this petition no additional fact record is necessary.

From the ruling of the Court of Civil Appeals Petitioner in due time made application to the Supreme Court of Texas for Writ of Error and among other points of error alleged (not necessary for inclusion here), attacked as being unconstitutional Sec. 12 of Art. 4505. Writ of Error was refused by the Supreme Court and in due time a Motion for rehearing was filed which said motion was denied. Petitioner has exhausted all of his state remedies and is now properly before this Court.

SPECIFICATION OF ERROR

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas committed error in affirming the trial court's judgment revoking Petitioner's license to prac-

tice medicine, because Sec. 12 of Art. 4505 of the Revised Civil Statutes of Texas violates the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of Texas committed Error in denying Petitioner's Application for Writ of Error which action was in effect condoning the error committed by the Court of Civil Appeals.

REASONS RELIED UPON BY PETITIONER FOR ALLOWANCE OF THE WRIT

Petitioner is being deprived of his liberty and property without due process of law, contrary to the 1st and 14th amendments to the Constitution of the United States in that Section 12 of Article 4505 of the Revised Civil Statutes of Texas, which the Court relied upon to revoke and deprive him of his license to practice medicine, violates the Constitution in that it has abridged petitioner's right to contract and impaired his contract of employment.

In this connection, it is pointed out that the trial court rendered judgment revoking his license on the grounds that he was employed on a salary by a layman. The trial evidence disclosed that laymen were the owners of the Hoxsey Cancer Clinic and that petitioner worked at said Clinic in the capacity of Doctor, drawing a salary of $2,000.00 per month. The Court of Civil Appeals for the Fifth Supreme Judicial District in its opinion upheld the trial court's judgment and interpreted Section 12 of Article 4505 of the Revised Civil Statutes of Texas to mean

that petitioner was as a matter of law, permitting and allowing Harry M. Hoxsey to use his license to practice medicine.

The Supreme Court of Texas, in denying his application for a writ of error, thereby upheld and sanctioned the ruling of the Court of Civil Appeals, making final the judgment of the trial court which has taken away petitioner's right to practice medicine in the State of Texas and abrogated his contract with the Hoxsey Cancer Clinic.

Art. 1, Sec. 10 of the United States Constitution, among other things provides—"No State shall pass any bill—or law impairing the obligation of contracts * * *."

The 14th Amendment, Sec. 1 thereof, among other things provides, "No State shall make or enforce any law which shall * * * deprive any person of * * * property, without due process of law."

It is the contention of Petitioner that his contract with the Clinic has been impaired in violation of Art. 1, Sec. 10 and that his contract was a valuable property right which has been taken from him in violation of the 14th Amendment.

The decision by the Court of Civil Appeals in petitioner's case, has interpreted Section 12 of Article 4505 of the Revised Civil Statutes of Texas, in such way that a licensed doctor now cannot work for an individual or a corporation on a salary. This decision followed the decision of *Rockett v. Texas State Board of Medical Examiners*, 287 S. W. 2d

190. Prior to these decisions, it was lawful in Texas for a doctor to work on a salary for a Corporation or an individual or at least these writers understand that to be the law, and cite as their authority, the case of *Woodson v. Scott & White Hospital, 186 S. W. 2d 720,* and the case of *Republic Reciprocal Insurance Association v. Colgin Hospital and Clinic, 65 S. W. 2d 286* and *Edwards v. West Texas Hospital, et al., 89 S. W. 2d 801.* In the *Republic Reciprocal Ins. Assn. v. Colgin Hospital and Clinic* case, the Supreme Court of Texas, Judge Harvey speaking for the Court, had this to say:

> "In ordinary acceptation, a sanitarium is an Institution for the medical treatment of sick persons, as well as for ministering to related needs of the patients. This treatment, reasonably embraces, within its purvue the services of natural persons who practice medicine. The Statutes expressly authorize corporations for the erection and maintenance of sanitoriums. R. S. Article 1302, Subd. 6. The authority in such a Corporation to provide medical treatment to the patients, and to employ, for that purpose, those persons who are duly licensed to practice medicine, is reasonably implied. It is quite true that by Article 742 of the Penal Code, it is made a crime for any person to practice medicine without complying with the requirement prescribed in Article 4498 of the Revised Civil Statutes (the latter article being worded the same as Article 739 of the Penal Code); but, when those requirements are met, there is nothing in the statutes which implies a prohibition against such person engaging his services to another. The prescribed requirements have regard to his authority to practice medicine upon human beings, and not to the character of his employer. In the present case, the Colgin Hospital & Clinic was invested with implied authority, in performing its

> corporate functions in respect to supplying medical treatment to its patients, to employ those persons who qualify, in accordance with the provisions of Article 4498, to practice medicine. The first certified question should be answered in the affirmative."

Judge Baugh, speaking for the Court of Civil Appeals at Austin, in the *Woodson v. Scott & White* case, among other things, said:

> "Obviously, under the Medical Practice Act of Texas —a license to practice medicine can be issued only to a natural person. On the other hand, Article 1302, Section 6, R. C. S., authorizes the formation of a corporation for the erection and maintenance of sanitoriums and in an approved opinion, the Supreme Court held in Republic Reciprocal Ins. Assn. v. Colgin Hospital & Clinic (Corp.),—that such corporation was invested with implied authority, in performing its corporate functions in respect to supplying medical treatment to its patients, to employ those persons, who qualify in accordance with the provisions of Atricle 4498 to practice medicine."

It is here pointed out that the question was raised directly in the *Woodson v. Scott & White* case, that the corporation was sharing in the Doctor's fees and the contract was sought to be declared void on the grounds that the corporation was engaged illegally in the practice of medicine by reason of the fact it was sharing in doctors' fees on this point, the Court, in order to not rule that the corporation was practicing medicine had this to say:

> "It is not controverted that all persons engaged in the operation of the Woodson Eye, Ear, Nose & Throat Clinic, under the contracts were licensed physicians. We think it is clear, however, that Woodson and his

associates, under said contract were neither employees nor agents of the corporation. They were more in the nature of independent contractors, and the percentage of the net proceeds collected by them and paid to the Hospital was rather in the nature of rentals, and as compensation to the Hospital for services it rendered to the Woodsons in sending to them its patients needing specialized treatment and for otherwise caring for such patients.

"The next contention made by appellant is that the contract in question is illegal and void because Scott & White Hospital, a private corporation and organized for profit, was engaged as such in the practice of medicine and surgery. Preliminary to the disposition of this issue, there is presented in a supplemental brief of Appellant, the further contention that the Court erred in excluding evidence offered by appellant to show the General medical and surgical fees collected by the Hospital between 1922 and 1943; the compensation paid by the Hospital to numerous physicians and surgeons from 1931 to 1943; statement of the assets, liabilities and net profits of the Hospital in 1922 to 1943; and testimony as to employment by the hospital of doctors on a salary basis. All of this was offered as attempting to show a general plan of operation of the Hospital and constituting the practice of medicine by the corporation."

In the *Edwards* case, the hospital corporation attempted to defend the case against it on the ground that it was a corporation and alleged that it did not personally examine or treat diseases, but only furnished doctors and facilities for that purpose.

These cases and the quotations made from them is done to show that the law in Texas prior to the decisions in petitioner's case and the *Rockett* case permitted doctors to work

for corporations and individuals on a salary. As a matter of fact all large hospitals in the United States today are corporations and have doctors on a salary which, under the ruling in question violates *Section 12, Article 4505 of the Revised Civil Statutes of Texas.* The change of judicial construction, Petitioner contends amounts to legislation. As a matter of fact, it was held to be such in *Douglas v. Pike County, 101 U. S., 687; 25 Law Ed. 968* and *Levin v. Baltimore & Ohio Railway Company, 17 At. 2nd, 101.*

Before the decision in Petitioner's case, Petitioner was pursuing his profession under a contract of employment, earning $2,000.00 per month. The decision not only abbrogated his contract, but put him out of business entirely by revoking his license to practice medicine. While Petitioner recognizes the State has a right to pass legislation regulating the practice of medicine and those persons licensed to pursue said profession, the State law must not be arbitrary and unreasonable and its interpretation of its own statutes, when the first amendment of the constitution is involved, is not binding on the Federal Court. This was the ruling in the case of *Rowekahm v. Mercantile Commerce Bank & Trust Co., 72 F. 2d 852,* and *McCullough v. Virginia, 172 U. S. 109, 43 L. Ed. 382.*

Where the Clause in the first amendment with reference to impairing of contracts is concerned, Courts have held:

> "Where this Clause is invoked, Supreme Court may determine for itself meaning and effect of contract." *Ingraham v. Henson, 297 U. S., 378; 80 L. E. 728.*

> "Respecting impairment of contract, question is not one of degree, manner or cause, but whether legislation encroaches in any respect on obligation of contract or dispenses with any part of its force. One of the tests as to 'impairment of contracts' is, that legislation has diminished its value." *Norfolk & W. Railway Co. v. Boyle, 12 Fed. Sup. 522*, and the cases cited therein.

The laws which exist at the time and place of making the contract and where it is to be performed, enter into and form a part of it. This embraces alike, those laws which affect validity, construction, discharge and enforcement. *Walker v. Whitehead, 16 Wall. 315, 21 L. Ed. 357;* and also *Farmer's Life Ins. Co. v. Walters, 10 S. W. 2d 698; Smith v. Elliott, 39 Tex. 201.* In this connection, it is pointed out that prior to the decision of the Court of Civil Appeals in Petitioner's case and a decision in the *Rockett* case, the decisions of the *Woodson v. Scott & White Hospital* and the *Republic Reciprocal Ins. Assn. v. Colgin* and the *Edwards v. West Texas Hospital* cases were the law in the State of Texas, and rendered valid Petitioner's contract of employment. It was held in *Muhlker v. New York Railway Company, 197 U. S. 570, 49 L. Ed. 872*, that where there is a diversity of State decisions, the first in time may constitute the obligation of the Contract and the measure of rights under it.

It has been held that while this clause affords no protection against impairment of the obligation of a contract by judicial decision, but where a State Court so placing its decision upon the construction of a contract, in substance and effect gives force to a statute complained of as impair-

ing the contract obligation, then jurisdiction of this Court attaches. *Columbia Etc. Electric Co. v. S. Carolina, 261 U. S. 236, 67 L. Ed. 629.*

This clause of the constitution is a limitation upon the legislative power of the State, whatever form it may assume. *Murray v. Charleston, 96 U. S. 444; 24 L. Ed. 760* and *U. S. v. United Shoe Machinery Co., 234 F. 127.*

The purpose of this constitutional provision was to preserve sacred the principle of the inviolability of contracts against the legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice and the consequent fluctuation of popular opinion. *Edwards v. Williamson, 70 A. L. A. 145.*

With reference to taking liberty and property without due process of law, Petitioner points out that the Courts have repeatedly held that the right to contract freely is one of fundamental right and that a license to practice his profession is a property right, and he urges that the statute in question by virtue of the interpretation placed upon it, by courts of Texas, has deprived him of his liberty and property, without due process of law, and in support of his contention, cites the following cases and their holdings.

> "A 'License' to engage in business or to practice a profession is a 'property right' that cannot be taken away without due process of law." *Laisne v. California State Board of Optometry, 123 Pa. 2d 457.*

"In the conduct of private businesses and private affairs, people themselves have liberty to select their own associates and persons with whom they will do business unimpaired by the 14th amendment of the Federal Constitution, and such liberty is guaranteed by this clause." *Browder v. Gayle, 142 F. Supp. 707; 1 L. Ed. 2, 113-245.*

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by this amendment." *Lochner v. New York, 198 U. S. 53; 49 L. Ed. 937.*

" 'Freedom of contract' is a basic right reserved to the people by the constitution, that a state cannot violate even under sanction of direct legislative act." *Springfield Fire & Marine Ins. Co. v. Holmes, 32 F. Supp. 964.*

" 'Liberty' within this section includes 'Liberty of contract' which means freedom from arbitrary or unreasonable restraint." *Saucier v. Life & Casualty Ins. Co. of Tennessee, 198 So. 625.*

"Right to contract freely, without unreasonable restraint by Gov. is one of the fundamental liberties of the individual protected by the 5th amendment and this amendment." *U. S. v. Seven Oaks Dairy Co., 10 F. Supp. 995.*

"Right to make contract concerning his business or wages to be received or paid is a part of individual's 'liberty' as well as a 'Property right'." *Ex Parte Moffett, 64 Pa. 2, 1190.*

CONCLUSION

For all the grounds and reasons heretofore stated, Petitioner says that this petition for Writ of Certiorari to the Court of Civil Appeals for the 5th Supreme Judicial Dis-

trict of Texas, to review the Judgment of said Court is well supported in law and in fact and ought to be allowed and granted and the case on final hearing reversed and the statute complained of on which said decision was based, held unconstitutional and void.

Respectfully submitted,

MARTIN & BAILEY,

By James H. Martin

1207 Texas Bank Bldg.,
Dallas, Texas,
Attorneys for Petitioner.

APPENDIX "A"

Dr. Donald WATT, D. O.,

Appellant,

v.

TEXAS STATE BOARD OF MEDICAL EXAMINERS,

Appellee.

No. 15240

Court of Civil Appeals of Texas

Dallas

May 31, 1957

Rehearing Denied June 28, 1957

Proceedings to review an order of the State Board of Medical Examiners cancelling a license to practice medicine. The District Court, Dallas County, Chas. E. Long, Jr., J., on trial de novo, overruled doctor's motion for judgment on jury's findings on special issues that the doctor was not associated in the practice of medicine with an unlicensed practitioner and did not permit the owners of the clinic by which employed to use his license, and granted board's motion for judgment n.o.v and rendered judgment suspending doctor's license to practice medicine for 18 months and the doctor appealed. The Court of Civil Appeals, Young, J., held that statute prohibiting one from permitting another to use his license for the purpose of treating or offering to treat sick, injured or afflicted human beings was violated where a doctor performed medical services for salary, and fees for his services were paid a clinic not owned by medical doctors, and that judgment

suspending doctor's license to practice medicine was justified.

Affirmed.

See, also, Tex. Civ. App., 287 S. W. 2d 559.

1. Judgment—Key No. 199(5)

Trial court may, upon motion for judgment n.o.v. and notice, disregard any special issue jury finding that has no support in evidence, but in acting upon such motion all testimony must be considered in a light most favorable to the party against whom the motion is sought, and every reasonable intendment deductible from the evidence is to be indulged in such party's favor. Rules of Civil Procedure, rule 301.

2. Physicians and Surgeons—Ney No. 11(2)

Where a licensed doctor performed medical services for salary, and fees for his services were collected by a clinic in which no medical doctors had an interest, such conduct was ground for suspension of doctor's license to practice medicine for 18 months for violation of statute prohibiting one from permitting another to use his license. Vernon's Ann. Civ. St. arts. 4505 (12, 13), 4506.

Martin & Bailey, Dallas, for appellant.

Henry Wade, Dist. Atty., and John J. Fagan, Asst. Dist. Atty., Dallas, for appellee.

YOUNG, Justice.

On November 7, 1955 appellee Board had entered an order permanently canceling and revoking appellant's license to practice medicine in the State of Texas. From this order Dr. Watt appealed to the District Court of Dallas County and upon a trial de novo (Art. 4506, V. A. C. S., as amended in 1953) the jury made answers to special issues; the Board having filed motion for peremptory instruction at close of testimony, which was denied. After the jury verdict, appellant filed motion for judgment on their answers, which was overruled. The Board, in turn, filed motion for judgment notwithstanding jury answers to issues 3 and 4, which being granted, the trial court rendered judgment suspending the license of Dr. Watt to practice medicine in the State of Texas for a period of eighteen months. Due exception and notice of appeal were taken to such court action.

Gravamen of the charges against Dr. Watt at the Medical Board hearing and on trial later in the District Court was violation of secs. 12 and 13, Art. 4505, V. A. C. S., as amended, Acts of 1939, 46th Legislature, and providing:

(12) "The impersonation of a licensed practitioner, or permitting, or allowing, another to use his license, or certificate to practice medicine in this State, for the purpose of treating, or offering to treat, sick, injured, or afflicted human beings." (13) "Employing, directly or indirectly, any person whose license to practice medicine has been suspended, or association in the practice of medicine with any person or persons whose license to practice medicine has been suspended, or any person who has been convicted of the unlawful practice of medicine in Texas or elsewhere."

The jury questions and answers were in effect: (1) That Harry M. Hoxsey, on or about December 5, 1930, in the County Court of Fulton County, Illinois, entered a plea of guilty to a charge of violating the Medical Practice Act of the State of Illinois, S. H. A. Ill. c. 91, §1 et seq.; (2) that Harry M. Hoxsey, on or about March 17, 1930, in the County Court of Marion County, Illinois, entered a plea of guilty to a complaint of engaging in the practice of medicine without having a valid and lawful license in the State of Illinois; (3) that on or about the 11th day of October, 1955 Donald Watt *was not* associated in the practice of medicine with Harry M. Hoxsey at Hoxsey Cancer Clinic, Dallas; (4) that on or about November 7, 1955 or before such date, Donald Watt *did not* permit or allow the owners of Hoxsey Cancer Clinic at 4507 Gaston Avenue, Dallas, to use his license or certificate to practice medicine in Texas for the purpose of treating or offering to treat sick, injured, afflicted human beings.

It is the position of appellant that only the jury answers to issues 3 and 4 are material to this controversy; there being abundant evidence in support of these issues, to wit: That he was not associated in the practice of medicine with Harry Hoxsey and had not allowed or loaned his license to practice medicine to the owners of Hoxsey Cancer Clinic; the trial court committing reversible error in disregarding said jury findings and in failing to render judgment favorable to him. Appellant's single point and answering counterpoints require an extensive recitation of matters testified to by Dr. Watt; in general, that he was 58 years of age,

first admitted to practice medicine in New York State in 1929; coming to Texas in 1943, taking examination and obtaining license to practice his profession through appellee Medical Board at Baylor University, Dallas. He had practiced at various places in Texas; for the past four years doing work for Hoxsey Cancer Clinic, consisting principally of reading or interpreting X-ray pictures. He is a certified roentgenologist, interprets more than 200 X-ray films daily, and has about eight people under him. He never knew that Harry Hoxsey had been convicted of practicing medicine without a license in the State of Illinois. After hours at the Hoxsey Clinic, where appellant is paid a salary to read X-ray pictures, he does some private practice by way of house calls, an activity not forbidden under his oral contract with the clinic, the money therefor belonging to him; that he does not and has not authorized anyone to do advertising in his behalf.

The testimony of Dr. Watt, relied on by appellee Board in support of judgment regardless of jury findings 3 and 4, will now be detailed:

> "Q. State when you began your connection with the Hoxsey Cancer Clinic? A. In 1949.
>
> "Q. And you stayed with them how long at that time? A. 2 years.
>
> "Q. And, then, you left and how long were you away from there? A. About one year.
>
> "Q. And then you came back? A. That's right. * * *
>
> "Q. What are your arrangements of association, or employment, with Harry M. Hoxsey, please sir? A. I am the man that interprets the X-ray film at the clinic.

"Q. Did Harry M. Hoxsey hire you when you were employed out there? A. Yes.

"Q. And he fixed your salary? A. Yes.

"Q. And he pays you each month your salary, whatever you may receive? A. That's right. * * *

"Q. What salary do you receive from him? A. $2,000.00 a month.

"Q. He and his wife you recognize as the owners of the Hoxsey Cancer Clinic and all of the buildings, equipment, X-ray machines, drugs and everything else out there? A. Yes. * * *

"Q. Now, any patients that come into the Hoxsey Cancer Clinic in answer to any report about you, or anybody else, you look on them as patients of the Clinic, do you not? A. That's right. * * *

"Q. You do not treat or separate your patients from the Cancer Clinic's patients? A. No, sir.

"Q. Do you have patients who come and who are processed through the Clinic procedure at the Receiving Desk and on through, and they are handled just as all patients are handled? A. That's right.

"Q. And the charges are made by whom? A. The Business Office.

"Q. And the fees, if any, are collected by the Business Office of the Hoxsey Cancer Clinic? A. That's right.

"Q. Now, any of the money paid by any of the patients goes into the treasury of the Hoxsey Cancer Clinic and you have nothing to do with it? A. That's correct.

"Q. And all that you look to is your salary? A. Yes.

"Q. In your Income Tax Report for the past few years have you shown any other source of income other than the salary that came from the Hoxsey Cancer

Clinic? A. No, sir; with the exception of some trips that I have made, which would be considered practice —a part of the income from the Clinic. Aside from my income from the Clinic I have had no other income; no sir. • • •

"Q. Now, your name appears in the telephone book in the yellow sheets under 'Doctor of Osteopathy—Cancer Treatment, etc.' Now, was that put in by the Business Office of the Clinic? A. Yes.

"Q. And is that paid for by them? A. Yes.

"Q. And you at various times hold Staff Meetings, Doctor Watt, with Dr. Charles Barberee, who is in charge of the Medical Staff? A. Yes • • •.

"Q. And who else is in charge of the Medical Staff? A. Nobody else. He is recognized as the Chief of Staff.

"Q. Is Harry M. Hoxsey present at all of these meetings? A. No, sir.

"Q. Or conferences? A. No, sir.

"Q. Is he present at some of them? A. Yes.

"Q. And he, at those conferences—Dr. Barbaree and Harry M. Hoxsey, the owner of the Clinic, he allows everybody to discuss matters—is that right? A. Yes; that's right.

"Q. And a vote is taken and the policies are decided then and there? A. That's right.

"Q. And, if Dr. Barberee is present, he votes and, if you are present you vote and if Harry M. Hoxsey is present, he votes? A. That's right. • • •

"Q. Do you have any written contract with him? A. No. Sir.

"Q. You have an oral contract with him and you are there as long as he wants to hire you? A. That's right.

"Q. And, he can fire you at any time? A. That's right. • • •

"Q. He merely employs you and the other doctors—Osteopaths and Medical Doctors—to practice your profession as you see it, and he takes care of the overhead and pays all of the salaries and he takes the profits or losses? A. Yes, sir. * * *

"Q. Now, in the event that you and your six (6) associates, who are Doctors of Osteopathy and M. D.'s, walked out of there today and left, or anything happened to you, he could not go on with the Clinic unless he got some more licensed doctors, could he? A. That, I would say, would be correct."

These additional facts were stipulated by the parties as not requiring proof: "(1) Dr. Donald Watt was employed by the Hoxsey Cancer Clinic on November 7, 1955 and for some months previous at a salary of $2,000.00 per month and receives no other fees from said clinic. (2) The Hoxsey Cancer Clinic was on said date and is now owned by Harry M. Hoxsey and Martha Hoxsey, his wife, who are not medical doctors and no medical doctor owns any interest in the clinic. (3) Dr. Donald Watt on said date, and prior thereto and now, performs medical services for the Hoxsey Cancer Clinic and fees for such service have been and are collected by the clinic from the patients. * * * (4) That neither Harry M. Hoxsey or Martha Hoxsey *practice* medicine in any manner whatsoever, at the Hoxsey Cancer Clinic."

[1] Under Rule 301, Texas Rules of Civil Procedure, the trial court may, upon motion and notice, disregard any special issue jury finding that has no support in the evidence. But in acting upon such a motion (for judgment non obstante veredicto) all testimony must be considered in a light most favorable to the party against whom the motion

is sought, and every reasonable intendment deductible from the evidence is to be indulged in such party's favor. 25 Tex. Jur., p. 502.

[2] From a reading of above testimony and stipulations it will be observed that Dr. Watt was employed by Hoxsey Cancer Clinic at a salary of $2,000 per month and received no other fees from the Clinic; that said Clinic was owned by Harry M. and Martha Hoxsey, who were not medical doctors and that no medical doctor owned any interest in the Clinic; that appellant performed medical services for Hoxsey Cancer Clinic, all fees for such services being collected by the Clinic from patients of the Clinic; and further, that Hoxsey and wife did not practice medicine in any manner whatsoever.

We find no distinction between the facts above stated and those presented in Rockett v. Texas State Board of Medical Examiners, Tex. Civ. App., 287 S. W. 2d 190, where Sec. 12, Article 4505, was construed. It was there held that the statute was violated when Dr. Rockett performed medical services for patients of the Thomas Clinic on a monthly salary, the fees for such services being collected by the Clinic owned by one not a medical doctor, and that a cancellation of his license to practice medicine was thereby justified. The trial court had found in favor of appellee Board, after discharge of jury upon their failure to agree; the San Antonio Court declaring that such action was proper under "the undisputed facts." On the point at issue that Court said: "Appellant was employed by Thomas

Clinic for a salary of $500 per month and he received no fees; the Clinic was owned by Ralph C. Thomas, who was not a medical doctor and no medical doctor owned any interest in the clinic; appellant performed medical services for the clinic and the fees for such services were collected by the clinic. Such conduct on the part of appellant was in effect 'permitting, or allowing, another to use his license or certificate to practice medicine in this State, for the purpose of treating, or offering to treat, sick, injured, or afflicted human beings', which conduct is prohibited by the provisions of Section 12 of Art. 4505, Vernon's Ann. Civ. Stats., and is made a ground for the forfeiture of a license to practice medicine by the provisions of Art. 4506, Vernon's Ann. Civ. Stats. See Section 5, Art. 4505."

We do not regard the cases cited by appellant as in point (Republic Reciprocal Ins. Ass'n v. Colgin Hospital & Clinic, 1933, 123 Tex. 31, 65 S. W. 2d 286, and Woodson v. Scott & White Hospital, Tex. Civ. App., 186 S. W. 2d 720); the case first cited holding, in effect, that a corporation or partnership may own a clinic and have implied lawful authority to employ licensed doctors to do their medical work. Sections 12 and 13 were not added to the provisions of Art. 4505 until 1939. In so far as relevant to the instant case, the Austin Court held in Woodson's appeal that under the contract there construed, Dr. Woodson and associates were neither employees nor agents, but rather occupied the status of independent contractors, serving their own patients; and that the percentage of fees paid over to the hospital was based on other and valid considerations.

We feel duty bound to follow the conclusions reached in the Rockett appeal. For notwithstanding the fact that our Supreme Court's disposition of the cause was that of "Writ refused, no reversible error", the question involved on such appeal was one of law—the construction of a statute. Rule 483, T. C. P.; and see City of Dallas v. Rosenthal, Tex. Civ. App., 239 S. W. 2d 636.

The judgment under review is accordingly affirmed.

"APPENDIX "B"

Article 4505. 5743 May refuse to admit certain persons.

The State Board of Medical Examiners may refuse to admit persons to its examinations, and to issue license to practice medicine to any person, for any of the following reasons:

(1) The presentation to the Board of any license, certificate, or diploma, which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination.

(2) Conviction of a crime of the grade of felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion.

(3) Habits of intemperance, or drug addiction, calculated, in the opinion of the Board, to endanger the lives of patients.

(4) Grossly unprofessional or dishonorable conduct, or a character which in the opinion of the Board is likely to deceive or defraud the public.

(5) The violation, or attempted violation, direct or indirect, of any of the provisions of this Act, either as a principal, accessory, or accomplice.

(6) The use of any advertising statement of a character tending to mislead or deceive the public.

(7) Advertising professional superiority, or the performance of professional service in a superior manner.

(8) The purchase, sale, barter, or use, or any offer to purchase, sell, barter, or use, any medical degree, license, certificate, diploma, or transcript of license, certificate, or diploma, in or incident to an application to the Board of Medical Examiners for license to practice medicine.

(9) Altering, with fraudulent intent, any medical license, certificate, diploma, or transcript of medical license, certificate or diploma.

(10) The use of any medical license, certificate, diploma, or transcript of any such medical license, certificate, or diploma, which had been fraudulently purchased, issued, counterfeited, or materially altered.

(11) The impersonation of, or acting as proxy for, another in any examination required by this Act for a medical license.

(12) The impersonation of a licensed petitioner, or permitting, or allowing, another to use his license, or certificate to practice medicine in this State, for the purpose of treating, or offering to treat, sick, injured, or afflicted human beings.

(13) Employing, directly or indirectly, any person whose license to practice medicine has been suspended, or association in the practice of medicine with any person or persons whose license to practice medicine has been suspended or any person who has been convicted of the unlawful practice of medicine in Texas or elsewhere.

Any applicant who may be refused admittance to examination shall have his right to have such issue tried in the District Court of the County in which he resides or in which any Board member resides. All orders of the Board shall be prima facie valid. *Acts 1907, p. 224, sec. 11; Acts 1939, 46th Leg., p. 352, §6.*

Art. 4506. 5744 Revocation, cancellation or suspension of license.

The district Courts of this State shall have the right to revoke, cancel, or suspend the license of any practitioner of medicine upon proof of the violation of the law in any respect in regard thereto, or for any cause for which the State Board of Medical Examiners shall be authorized to refuse to admit persons to its examination, as provided in Article 4505 of the Revised Civil Statutes of Texas of 1925, as amended by this Act, and it shall be the duty of the several District and County Attorneys of this State to file and prosecute appropriate judicial proceedings for such revocation, cancellation, or suspension, in the name of the State, on request of the Board of Medical Examiners. *Acts 1907, p. 224, sec. 12; Acts 1939, 46th Leg., p. 352, §7.*